**IN THE COURT OF APPEALS**
**FIRST APPELLATE DISTRICT OF OHIO**
**HAMILTON COUNTY, OHIO**

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| STATE OF OHIO, | : | APPEAL NOS. C-150411<br>C-150412 |
| Plaintiff-Appellee, | : | TRIAL NOS. 14TRC-59405 A<br>14TRC-59405 D |
| vs. | : | |
| ZACHARY HENNESSY, | : | *JUDGMENT ENTRY.* |
| Defendant-Appellant. | : | |

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Zachary Hennessy was charged with operating a vehicle while under the influence of alcohol ("OVI"), refusal of a chemical test, speeding, and following too closely. He entered not-guilty pleas and filed a motion to suppress, among other things, the results of the walk-and-turn and one-leg-stand tests and his roadside statements to the trooper, which the trial court overruled. The OVI and refusal charges were tried to a jury, which found Hennessy guilty of both offenses. Hennessy was also found guilty of the traffic offenses following a trial to the court. The trial court sentenced Hennessy as appears of record. In this appeal, Hennessy challenges only his conviction for OVI.

In his first assignment of error, Hennessy argues the trial court erred when it did not suppress the results of the walk-and-turn and one-leg-stand tests because

they were not conducted in substantial compliance with the National Highway Traffic Safety Administration ("NHTSA") standards.

At the suppression hearing, the trial court took judicial notice of the NHTSA manual. The state presented testimony from Trooper Jacques Illanz. Trooper Illanz testified as to his training, how he had administered each test, and how Hennessy had performed on the tests. Trooper Illanz testified that he had followed the NHTSA standards for both the walk-and-turn and one-leg-stand tests, and that Hennessy had exhibited multiple clues on both tests.

Hennessy argues that the trial court should have suppressed the results of the walk-and-turn and one-leg-stand tests, because Trooper Illanz admitted on cross-examination that he did not expressly ask Hennessy before administering these tests, if he suffered from back, leg, or inner ear problems. Hennessy argues that because he presented evidence at the suppression hearing that he suffers from mild scoliosis, the trooper should have adapted the tests to accommodate his physical condition. He relies on *State v. Lange*, 12th Dist. Butler No. CA2007-09-232, 2008-Ohio-3595, to support his position.

But *Lange* is factually distinguishable. In *Lange*, the officer failed to inquire whether the defendant had any physical problems before administering the walk-and-turn test. The defendant attempted to perform the walk-and-turn test, but had problems completing the test before refusing to continue. When the officer began to explain the one-leg-stand test, the defendant told the officer he could not complete the one-leg-stand because of problems with his legs, and the officer stopped the test. *Id.* at ¶ 14. The Twelfth District upheld the trial court's suppression of the results of the walk-and-turn test based upon the officer's failure to consider or adapt the test to accommodate the defendant's leg problems. *Id.* at ¶ 16.

Here, however, Trooper Illanz testified that before administering the field-sobriety tests, he asked Hennessy if he had any medical issues. Hennessy told the trooper that he did not. Trooper Illanz further testified that had Hennessy advised him of his medical condition, he would have taken it into consideration in administering the tests.

Moreover, this court has stated that section VIII of the NHTSA manual mentions leg and back problems only in connection with the administration of the one-leg-stand test, and not the walk-and-turn test. *See State v. Kaczmarek*, 1st Dist. Hamilton No. C-140610, 2015-Ohio-3852, ¶ 10. Nor does the NHTSA manual require an officer to specifically inquire if a person has these physical problems before administering the one-leg-stand test. *Id.*; *see also State v. Davis*, 2d Dist. Clark No. 2008 CA 65, 2009-Ohio-3759, ¶ 21. Given that the officer generally asked Hennessy if he had medical problems and section VIII of the NHTSA manual does not require specific questioning about leg or back problems prior to the administration of the one-leg-stand and the walk-and-turn tests, we conclude that Trooper Illanz substantially complied with the NHTSA standards when administering the walk-and-turn and one-leg-stand tests.

Hennessy also contends Trooper Illanz failed to provide the proper instructions for the walk-and-turn test, because he used the word "pivot" instead of turn and he failed to instruct Hennessy to maintain his position until the trooper finished his instructions for the test. Although Trooper Illanz may not have given Hennessy verbatim the instructions for the walk-and-turn test, he was not required to do so. *See State v. King*, 11th Dist. Portage No. 2009-P-0040, 2010-Ohio-3254, ¶ 35-39. Moreover, we conclude based upon our review of the record that Trooper Illanz administered the walk-and-turn test in substantial compliance with the

NHTSA standards. Thus, we cannot conclude the trial court erred in failing to suppress the test results on this basis. We, therefore, overrule the first assignment of error.

In his second assignment of error, Hennessy argues that trial court erred in failing to suppress his roadside statement to Trooper Illanz that he had consumed four beers in three hours. He argues that Trooper Illanz should have given him the warnings in *Miranda v. Arizona*, 384 U.S. 43, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before asking him how much alcohol he had consumed.

> Generally, motorists temporarily detained during ordinary traffic stops are not in custody for purposes of *Miranda*. Routine questioning of a motorist during a traffic stop does not automatically convert the detention into one involving a custodial interrogation. But if a stopped motorist is subjected to treatment that renders him in custody for practical purposes, he is entitled to the protections spelled out in *Miranda*.

(Citations omitted). *State v. Baumgarter*, 1st Dist. Hamilton No. C-070271, 2008-Ohio-1725, ¶ 13.

Here, Trooper Illanz testified that following Hennessy's poor performance on the field-sobriety tests, he had asked Hennessy if he had consumed any alcohol. Hennessy had then replied that he had consumed four beers in three hours. When asked on cross-examination if Hennessy was in custody at that time, Trooper Illanz testified that at that point he had probable cause to arrest Hennessy, and that Hennessy was not free to leave. However, Trooper Illanz, clarified on redirect examination, that he did not communicate this information to Hennessy, and he did not handcuff Hennessy until after Hennessy had made the foregoing statement.

Under these circumstances, we cannot conclude that Trooper Illanz's unarticulated plan to arrest Hennessy had any bearing on whether Hennessy was in custody at the time he made the statement to the trooper. *See State v. Wells*, 2d Dist. Montgomery No. 20798, 2005-Ohio-5008, ¶ 50-56, quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *see also State v. Darrah*, 64 Ohio St.2d 22, 26, 412 N.E.2d 1328 (1980). Because the record reflects that a reasonable person in Hennessy's position would not have understood himself to be under arrest at the time he made the statement, the trial court properly concluded that Hennessy's statements to Trooper Illanz had not been obtained in violation of his *Miranda* rights. *See Baumgarter*, 1st Dist. Hamilton No. C-070271, 2008-Ohio-1725, at ¶ 15.

We, therefore, overrule the second assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**FISCHER, P.J., MOCK** and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on March 2, 2016

per order of the court _____.

Presiding Judge